

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

CAROL A. JOLLIFFE

v.

OFFICE OF PERSONNEL MANAGEMENT)  
CSA 2 573 907

DOCKET NUMBER  
DC831L8410253

DATE: 2 1 SEP 1984

OPINION AND ORDER

This case comes before the Board on the Office of Personnel Management's (OPM) petition for review of an initial decision issued May 8, 1984. In the initial decision, the presiding official found that appellant established that she was disabled pursuant to 5 C.F.R. Section 8337(a)1/ and he thus reversed the OPM reconsideration decision of December 7, 1983 which denied the appellant's disability retirement claim.

The petition for review contends inter alia that the initial decision is in error because the record does not establish that appellant's pain disabled her in the performance of her duties. We agree. The petition for review is hereby GRANTED pursuant to 5 U.S.C. Section 7701(e)(1).

We have carefully reviewed the evidence of record in this case. Record evidence indicates that appellant is a Research Staff Analyst, GS-301-10, in the Office of the Inspector General, Department of the Treasury. At the time

---

1/ 5 C.F.R. Section 8337(a) provides in pertinent part as follows:

" . . . Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service."

she filed her disability retirement application in July 1982, she had almost 20 years of federal service and was in her mid-forties. Her back problems, the basis of her retirement claim, began following an auto accident in 1976. In 1977 a laminectomy and spinal fusion was performed. Appellant was able to resume work and did not experience further problems until she injured her back while at work on April 29, 1982 when she was carrying a heavy bag of office supplies. It is undisputed that appellant's present back problems include ligament and muscular strain to the structures in the lower lumbar area and nerve root compression (pressure on the nerve) possibly due to scar tissue from the prior back surgery. See letter of Dr. R. P. Nirschl, of January 18, 1984, appeal file, tab 10. Likewise, it is uncontroverted that appellant experiences pain. Appellant stated in her disability retirement application of July 26, 1982 that since the April 1982 injury she has " . . . severe lower back pain and numbness in [my] right leg making sitting and driving for long periods impossible". Appeal file, tab 8E.

Appellant must show by a preponderance of the evidence that she meets the criteria for disability retirement, that is, that she is no longer able to render useful and efficient service in her position and is not qualified for reassignment to any other position at the same grade or level. See Chavez v. Office of Personnel Management, 6 MSPB 343, 353 (1981), and Wagner v. Office of Personnel Management, 7 MSPB 174 (1981). While in both Chavez and Wagner the Board held that subjective evidence of pain may be considered together with other record evidence in a disability determination, the record must show exactly how appellant's condition renders her unable to perform specific requirements of her position including a showing of the degree to which the pain can or cannot be controlled. Wagner at 175. Appellant has failed to meet this burden of proof.

In this regard appellant testified that the pain is constant, ranging from moderate to severe, and that the intensity of the pain depends to a large extent upon her activities. Appellant stated that she obtains some relief from anti-inflammatory medication and medication to relieve muscle spasms but that she still cannot sit or drive for long periods of time. Appellant stated that she needs frequent changes of position, and that she cannot walk, sit or stand for more than 30 minutes at a time. She further testified that unless the pain could be relieved she would be too distracted by it to function effectively at work. With regard to the effects of her physical problems on her ability to fulfill the duties of her position, she further testified that the pain would preclude her from being available to handle numerous telephone calls, some of an emergency nature, dealing with complaints to the Inspector General, and from attending frequent and long staff meetings. She also testified that one of the major problems in returning to work was the long commute from her home in Leesburg to the Office because long periods of driving caused intense pain and numbness in her right leg. Hearing Tape 1, side B and Tape 2, side A.

Dr. Nirschl, an orthopedic surgeon and appellant's primary treating physician, testified at the hearing and confirmed the fact that appellant was in pain and that hospitalization in 1983 had failed to relieve the pain. He stated however, that he would encourage activity and that appellant might be able to work with five 15 minute rest periods per day. Hearing Tape 1, side A.<sup>2/</sup> Dr. Nirschl stated that appellant could function in her position if her pain was controlled and if certain modifications, such as permitting her frequent breaks and providing a proper chair, were made.

---

<sup>2/</sup> Another treating physician, Dr. Bucur, found that appellant was not disabled. The record does not contain any detailed basis for this conclusion. See report of August 23, 1982, appeal file, Tab 8D.

Although the Department of the Treasury certified that there were no positions to which appellant could be reassigned, there is no other evidence on this matter in the record. Regarding appellant's ability to perform the duties of her position, her immediate superior, the Inspector General, stated. "[E]mployee has been unable to come to work. Thus she has not been able to perform any of the listed duties."<sup>3/</sup> The Board is therefore unable to determine if she can perform her duties with or without accommodation.

Therefore, on the basis of the record evidence we cannot conclude that appellant is disabled for useful and efficient service. While she does suffer pain she is neither totally incapacitated nor completely limited in her activities. Moreover, while it may be difficult or well nigh impossible for appellant to commute from Leesburg, this is not a relevant consideration in a disability retirement determination. The relevant consideration is whether appellant can perform the duties of her position and the record does not establish that there are any duties that appellant is unable to perform.

Accordingly, the initial decision is hereby REVERSED and the OPM reconsideration decision denying disability retirement benefits is SUSTAINED. This is the final decision of the Merit Systems Protection Board in this appeal.

The appellant may have the right to judicial review of the Board's decision pursuant to 5 U.S.C. Section 7703(b)(1) by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place N.W., Washington, D.C. 20439. The Court of Appeals has held that the Board's decision in a disability retirement

---

<sup>3/</sup> It appears that appellant returned to work for a brief period of a few days following the April 29 injury. The record, however, is devoid of evidence on the question of her performance during that time.

appeal under 5 U.S.C. Section 8347(d)(1) is not subject to judicial review, but that decision is now under review by the Supreme Court. Lindahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983), cert. granted, 52 U.S.L.W. 3906 (U.S. June 18, 1984), (No. 83-5954). The petition for review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:



Stephen E. Manrose  
Acting Clerk

Washington, D.C.